UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CHAVEY ELECTRICAL CONTRACTING, INC.

and Case 28–CA–18553(E)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 412, AFL–CIO

SUPPLEMENTAL DECISION

and

ORDER GRANTING MOTION TO DISMISS APPLICATION

Introduction

On February 24, 2004, the National Labor Relations Board issued, in the absence of exceptions, its order adopting my findings and conclusions, and dismissing the complaint in the underlying matter. Thereafter, on March 24, 2004, the Applicant, Chavey Electrical Contracting, Inc., through its attorney Anne Marie Turner, filed a timely application for attorneys fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, as codified in Board rule §102.143. On March 26, 2004, the Board referred the application to me for appropriate action. [1]

On April 26, 2004, The General Counsel filed a motion to dismiss the application and on May 13, 2004, the Applicant filed a response thereto. The applicant contends that the complaint in the underlying case was unwarranted because the General Counsel was not substantially justified [2] in issuing the complaint. It points to certain factual findings which I made and which, it argues, the General Counsel knew, or should have known, would be made. The applicant specifically points to my determination that the General Counsel did not establish a prima facie case with the evidence it offered at the hearing. The General Counsel counters, asserting that

[1] Although it is not before me, the Applicant, also on March 24, petitioned the Board to modify the rule governing the maximum reimbursement rate for attorneys.

[2] In pertinent part EAJA states: Sec. 504. **Costs and fees of parties** (a)(1) An agency that conducts an adversary adjudication *shall award, to a prevailing party* other than the United States, *fees and other expenses* incurred by that party in connection with that proceeding, *unless* the adjudicative officer of the agency finds that *the position of the agency was substantially justified* or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. (Italics supplied).

its decision to issue the complaint was supported by facts uncovered during the course of the investigation which warrant the conclusion that the complaint was substantially justified. It, too, points to evidence and testimony it adduced during the course of the hearing in support of that contention. It further observes that the case hinged, in large part on credibility determinations that needed to be resolved by a trier-of-fact. It also argues that during the course of the investigation the Applicant did not clearly articulate or provide evidence in support of its contention, made at the hearing, that Respondent's financial circumstances were such that the employees in question would have been laid off no matter what their protected activities may have been. The Applicant's neglect to do that, asserts the General Counsel, meant the General Counsel was deprived of the opportunity to properly consider that defense at the pre-complaint, or even the pre-hearing, stages.

The Theory of the Complaint

The complaint alleged that the Applicant, through its foreman, Julian Martinez, threatened employees with an unspecified reprisal if they did not tell a New Mexico Department of Labor (NMDOL) investigator that they were laborers and not electrical helpers, i.e., Martinez would report them to company owner Dana Chavey who, in turn, would carry out the reprisal. The complaint also asserted that two of its laborer/helpers, Hensley and Hunter, were discharged because of §7 protected activity — a) filing claims for prevailing wages with the NMDOL and/or b) seeking union representation.

The threat allegation on its face required a credibility resolution. Where oral threats are supposed to have been uttered, the trier-of-fact nearly always must assess the relative credibility of opposing witnesses. That was certainly true in this case. From the outset, the General Counsel needed to provide a witness who heard Martinez make the threat. And, the General Counsel called Hunter to provide it. Hunter's testimony on direct met the requirement, although on cross-examination he gave a non-coercive version, thereby undermining his original account. Nonetheless, the General Counsel backed Hunter's direct testimony with the supporting (though not corroborating) testimony of another employee, Pioche, who described an earlier instruction Martinez supposedly had given him and another employee, Todacheenie, which was consistent with the demand Hunter described. Martinez denied the threat and placed the instructions in a non-coercive light. Ultimately, I discredited the Hunter-Pioche versions for three reasons: timeline considerations, Hunter's recantation (and his connected inability to distinguish between his direct and his cross), and Martinez' non-coercive explanation, actually supported by Pioche.

The methodology used to determine whether the threat occurred was ordinary and routine: I compared the two versions, examined them against objective, or at least unchallenged, facts (here the timeline and the context), considered the witnesses' respective demeanor, and chose what I deemed to be the most plausible. This was classic credibility resolution.

With respect to the discharge of employees Hunter and Hensley, the General Counsel relied in large part on the testimony of NMDOL investigator Drake, who testified that during his jobsite investigation Martinez had threatened to discharge employees if the NMDOL insisted on the Applicant paying them prevailing wages. Had Drake been believed, the General Counsel might well have carried the day, at least up to the point the Applicant offered the financial defense. Certainly the General Counsel would have established a prima facie case for an unlawful discharge complaint. I do think ultimately the financial evidence would have rebutted it, but it is unclear whether it would have persuaded the General Counsel to decline the complaint. Weighing contrary evidence is the judge's and the Agency's job.

Like Hunter, Drake's testimony did not survive a routine credibility analysis, and the Applicant argues that the General Counsel should have known he would not. In some respects, I am sympathetic to the Applicant's point of view. [3]

Facially, an NMDOL investigator would seem likely to be a credible witness to call upon. One would normally expect such a person to have approached his duties in a professional manner and to have given dispassionate testimony. Yet, Drake's lack of professionalism and his hubris revealed an unacceptable bias. In the hindsight which the Applicant now enjoys, a more thorough vetting of his interests and behavior might well have exposed Drake at the investigative stage. Certainly his conduct was questionable in more than one respect, any one of which should have raised a warning flag. These included Drake's providing investigative information to union organizer Bitsui for organizing purposes, his asking the organizer to go to the site to collect photographic evidence for the NMDOL (both entirely unprofessional, if not a violation of state law), and his failure to at least telephone Dana Chavey when Martinez invited him to do so (an opportunity a professional investigator would not let pass). These were things the Region's field investigator did know. She must have seen something was amiss and could have given Drake greater scrutiny. Aside from Drake's behavior, the facts as developed at the hearing demonstrated that Martinez' lack of firing authority and his lack of knowledge concerning prevailing wage laws were such that the probability of his making such a threat was near zero, while the probability of his referring such matters to Chavey were very high. When Drake admitted that Martinez had referred him to Chavey, Drake's testimony about the threat, in my view, collapsed.

Even so, whether additional investigation was performed or not, whether a closer examination of the evidence transpired upon its completion or not, the General Counsel ultimately had to contend with Drake's proffered testimony. It is difficult for me to conclude that the complaint would have been withheld based on either additional evidence or the elevated scrutiny the Applicant suggests should have taken place. Although I think Regional offices can make greater efforts to administratively resolve credibility issues than they ordinarily do, my opinion finds no support in the facts presented here, for there was no way the General Counsel would not present Drake's testimony. If believed, it would have established a prima facie case. Prosecutors cannot ignore such evidence, particularly where the other elements of the prima facie case are present. Here the other elements were easy to see: The Applicant knew about the employees' §7 activity (it was aware that they had filed NMDOL wage claims and their names had been identified in the Union's letter as in-house organizers) and the discharges were temporally aligned with that activity. The only missing factor was animus. That evidence could have been inferred from Hunter's testimony and more clearly discerned from Drake's. In that circumstance, the General Counsel, even if he knew both witnesses' versions were somewhat vulnerable, could reasonably decide to put the matter to a trier-of-fact and let a judge decide.

[3] Part of the Applicant's frustration is no doubt grounded in the General Counsel's near-intransigent insistence on a backpay settlement which incorporated the NMDOL's then view of the prevailing wage rate as the proper gross backpay calculation. Not only was the Applicant aware that the demand was not in accord with Board practice, it believed such an amount would have been ruinous, given its financial situation. Faced with that demand, the Applicant concluded the General Counsel was making a bad situation even worse. Now that the Applicant has seen the General Counsel's case, it no doubt thinks that if the General Counsel had been more cognizant of its own evidentiary weaknesses, a settlement may have been negotiated which all parties could have found palatable.

Applicable Law

EAJA became law based upon the Congress' perception that federal agencies were sometimes overreaching in issuing administrative orders and forcing small businesses to defend unmeritorious cases and expend monies which they could not afford defending them. Sometimes these included cases where an agency was attempting to obtain a clarification of law or an expansive interpretation of the law. It did not want to bar agencies from enforcing the laws they are charged to enforce, but did want those agencies to do it in a responsible manner. It was for this reason that 5 U.S.C. §504(a)(1), was written in the positive manner it is. It states in pertinent part (edited for clarity): An agency that [loses an enforcement proceeding] shall award, to [the winning defendant], fees and other expenses incurred by [the defendant], *unless*. . . the position of the agency was *substantially justified* . . . ." [4] EAJA was a mandate directing agencies to proceed only if the agency was prepared to show, in the event it lost the case, that its decision was 'substantially justified.' The statute goes on to say that the justification must be found in the administrative record.

Credibility, if not the most common issue seen in adversary proceedings, is certainly one of the most frequent. In general, if the agency's prosecuting authority believes the testimony of witnesses will provide the elements needed to be proven, it also knows contrary evidence is likely to be adduced by the defendant. At the same time, it understands there is some likelihood that the defendant's evidence will prevail. EAJA was not designed to prevent the agency in that case from seeking to enforce the law it is charged with implementing. Clearly an enforcement proceeding in that circumstance qualifies as 'substantial justification'. It is only in cases where the agency fails to be reasonable in both law and fact that it will not meet the 'substantial justification' requirement. [5] Such cases are most likely uninvestigated/unresearched cases or test cases of some kind. The former are those which the Congress wanted to halt; the latter involve an agency's deliberate assessment of the risk. Establishing a legal principle may well be worth the risk of losing the EAJA case. Indeed, I can envision an agency issuing a complaint simply to establish a bright line rule of some kind, thereby chancing the loss of an EAJA claim.

In most respects substantial justification is only the familiar test of reasonableness. See Judge Lawrence's decision in *Ellison Bakery*, 304 NLRB 1131 (1991) where he said: "While the burden of establishing substantial justification is on the Government, the fact that it lost its case does not give rise to any presumption that it acted unreasonably nor must the General Counsel establish a prima facie case as a prerequisite to finding that its position was reasonable in law and fact." (Footnote omitted.) Thus even the inability to establish a prima facie case, particularly where it is based on credibility, will not necessarily lead to a finding that the complaint was not 'substantially justified.' Also, *Jim's Big M*, 266 NLRB 665 (1983), affd. 774 F.2d 1446 (2d Cir. 1984)

I need not explore the range of agency conduct which might draw a meritorious EAJA award. In cases where credibility issues cannot be administratively determined on the basis of documentary or other objective evidence but can only be resolved on the basis of an evaluation of conflicting testimony, the General Counsel will be substantially justified in bringing the issue before an administrative law judge. *Advance Development*, 277 NLRB 1086 (1985) citing *Charles H. McCauley Associates*, 269 NLRB 791, 793 (1984) and *Jim's Big M*, supra at 666. Also, *SME Cement, Inc.*, 267 NLRB 763 (1983); *Barrett's Contemporary & Scandinavian Interiors*, 272 NLRB 527 (1984); *David Allen Co.*, 335 NLRB 783 (2001); *Tim Foley Plumbing Service*, 337 NLRB 328 (2001).

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[4] See fn. 2 for the precise language of the statute.

[5] See *Pierce v. Underwood*, 487 U.S. 552 (1988).

Accordingly, the application will be dismissed since the General Counsel presented in the underlying case credibility determinations which required resolution by a fact-finder at a hearing.

However, one further item needs explication, the overarching financial necessity defense. I said in the underlying decision, that because of the credibility resolutions against it, the General Counsel had failed to make out a prima facie case. I went on to observe, that even if one could somehow find a prima facie case, it would have been rebutted by the Applicant's lack of ability to meet payroll, a circumstance which would have led to the employees' discharge at the same moment it occurred. The Applicant has therefore argued that the financial necessity argument trumps all that has gone before, because even if I credited the General Counsel's witnesses and a prima facie case had been established, the Applicant would still have prevailed.

I cannot agree. As the General Counsel has observed, this defense was not presented during the investigation and the General Counsel possessed no evidence about it whatsoever. That information had been kept private by the Applicant, though it could have provided it to the NLRB investigator. See ALJD at 13. Had the Applicant done so, the Regional Office would have been better able to assess its likelihood of prevailing and, quite possibly, a complaint would not have been issued. Instead of providing that information, the Applicant focused on what it believed was the same thing, "lack of work." Literally, of course, the Applicant still had work to perform at the time of the layoffs. And while I understand the euphemism was intended to avoid revealing the true state of things, the investigator did not get that point. "Lack of work" is understandable when speaking to employees; it is less easily perceived by the investigator or the Regional office when left unexplained as the Applicant did when it provided that reason during the investigation. Had the Applicant detailed its payroll situation, the General Counsel, who is as familiar with the euphemism as the Board and I are, would no doubt have understood, as well. But here it was the Applicant who failed to deliver the defense in a manner designed to avoid the complaint. That lapse is what contributed to the issuance of the complaint, not the General Counsel's overlooking a valid defense. As Judge Jacobs said in *C.I. Whitten Transfer Co.*, 312, NLRB 28 (1993), "If Respondent had made its witnesses available during the investigation, as it did during the hearing, and if it had supplied the investigator with the records it made available later, it is quite reasonable to believe that the complaint might never have issued. Respondent cannot now rely on its own lack of cooperation to support its application for attorney's fees pursuant to Equal Access to Justice Act." (Footnotes omitted.) As in *Whitten*, the Applicant cannot rely on its own neglect to support its claim. This argument is rejected.

In sum, I find that the General Counsel was substantially justified in issuing the complaint and requiring the Applicant to defend. The General Counsel's motion to dismiss the Application is GRANTED and the Application for Attorneys Fees and Expenses is hereby DISMISSED.

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James M. Kennedy
Administrative Law Judge

Dated: June 25, 2004